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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 GLENN EDWIN CLAY,

12 Plaintiff,

13 v.

14 DENISE LANKFORD, LT. SAVALA,
15 CARLOS RAMOS, MARK GOMES, M.
16 HAWTHORNE, SILVIA GARCIA,

17 Defendants.

Civil No. 11cv1170-AJB(RBB)

**ORDER ADOPTING IN PART AND
DECLINING TO ADOPT IN PART
REPORT AND RECOMMENDATION
GRANTING IN PART AND DENYING
IN PART DEFENDANTS' MOTION TO
DISMISS**

[Doc. No. 5.]

18 On April 12, 2011, Plaintiff Glenn Edwin Clay, a state prisoner proceeding *pro se*, filed a
19 civil rights complaint pursuant to 42 U.S.C. § 1983 in the California Superior Court, San Diego
20 County. (Dkt. No. 1.) On May 27, 2011, the case was removed to this Court. (*Id.*) On June 3,
21 2011, Defendants filed a motion to dismiss the complaint. (Dkt. No. 5.) An opposition was not
22 filed. On October 24, 2011, Magistrate Judge Brooks filed a report and recommendation granting in
23 part and denying in part Defendants' motion to dismiss the complaint. (Dkt. No. 7.) Objections
24 were filed by Defendants Savala and Garcia on November 21, 2011. (Dkt. No. 8.) For the reasons
25 set forth below, the Court ADOPTS in part and DECLINES to ADOPT in part the report and
26 recommendation granting in part and denying in part Defendants' motion to dismiss.

27 **Procedural Background**

28 The complaint alleges claims against Defendants D. Lankford, G. Savala, M. Gomes, C.

Ramos, S. Garcia and M. Hawthorne under 42 U.S.C. § 1983 based on Plaintiff's termination from his prison job as a forklift operator in the food department of the warehouse by Defendant Lankford and the failure to prevent the termination and to reinstate him by the remaining defendants. On May 27, 2011, the case was removed to this Court. (Dkt. No. 1.) On June 2, 2011, Defendants G. Savala, M. Gomes, C. Ramos, D. Lankford and S. Garcia were served with the complaint. Defendant M. Hawthorne has not been served with the complaint. The report and recommendation recommended that the Court should *sua sponte* dismiss Defendant Hawthorne without prejudice for Plaintiff's failure to comply with Federal Rule of Civil Procedure 4(m). No objections having been filed by Plaintiff and no reasons having been provided why Hawthorne has not been served, the Court ADOPTS the report and recommendation and *sua sponte* DISMISSES Defendant Hawthorne without prejudice.

Discussion

A. Scope of Review of Magistrate Judge's Report and Recommendation

The district court "shall make a *de novo* determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1); see also Fed. R. Civ. P. 72(b). A district court may adopt those parts of a Magistrate Judge's report to which no specific objection is made, provided they are not clearly erroneous. Thomas v. Arn, 474 U.S. 140, 152-53 (1985).

B. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)

Defendants Lankford, Ramos and Gomes did not file objections to the report and recommendation. After a review of the report and recommendation, the Court ADOPTS the report and recommendation and GRANTS Defendants Lankford, Ramos and Gomes' motion to dismiss the first, third and fourth causes of action against them, respectively, for Plaintiff's failure to comply with the statute of limitations. The Court GRANTS Plaintiff leave to amend to replead those claims that accrued after April 10, 2007.

In addition, the report recommended granting Defendants' motion to dismiss the state negligence cause of action for failure to plead compliance with the California Government Tort Claims Act. No objections having been filed, the Court ADOPTS the report and recommendation

1 and GRANTS Defendants' motion to dismiss the state negligence cause of action with leave to
2 amend.

3 Defendants Savala and Garcia filed objections to the report and recommendation based on
4 the Magistrate Judge's denial of the what Defendants call "everything-but-the-kitchen-sink" claims
5 because Defendants did not provide the Court with substantive arguments as to each specific claim
6 or theories of liability but only provided a general argument that Plaintiff has not provided a "short
7 and plain statement of the claim showing that the pleader is entitled to relief" as required under
8 Federal Rule of Civil Procedure 8(a)(2).

9 Plaintiff alleges eleven claims against Defendants Savala and Garcia. They include due
10 process, conspiracy, racial discrimination, discrimination, freedom of association, free speech,
11 freedom from cruel and unusual punishment, deprivation of rights, equal protection, federal civil
12 procedure, and negligence. (Compl. at 11-16, 55-66.)¹ The Court now addresses whether Plaintiff
13 has stated a claim for relief as to Defendants Savala and Garcia under Federal Rule of Civil
14 Procedure 12(b)(6).

15 **C. Standard under Federal Rule of Civil Procedure 12(b)(6)**

16 A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure
17 12(b)(6) tests the legal sufficiency of the claims in the complaint. Navarro v. Block, 250 F.3d 729,
18 732 (9th Cir. 2001). A motion to dismiss should be granted if plaintiff fails to proffer "enough facts
19 to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
20 (2007).

21 Allegations of material fact are taken as true and construed in the light most favorable to the
22 nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). The court
23 need not, however, accept as true allegations that are conclusory, legal conclusions, unwarranted
24 deductions of fact or unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979,
25 988 (9th Cir. 2001); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the
26 elements of a cause of action, supported by mere conclusory statements, do not suffice."); Twombly,
27 550 U.S. at 555 (on motion to dismiss court is "not bound to accept as true a legal conclusion
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¹The page numbers are based on the CM/ECF pagination.

1 couched as a factual allegation.”). “Conclusory allegations of a violation of section 1983 or
 2 conspiracy to violate section 1983 will not survive a motion to dismiss.” Simmons v. Sacramento
 3 County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003); Price v. Hawaii, 939 F.2d 702, 707–08
 4 (9th Cir. 1991) (stating that “[c]onclusory allegations, unsupported by facts, [will be] rejected as
 5 insufficient to state a claim under the Civil Rights Act.”) “In sum, for a complaint to survive a
 6 motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences [drawn] from that
 7 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. United
 8 States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal, 129 S. Ct. at 1499).

9 Where a plaintiff appears in propria persona in a civil rights case, the court must construe the
 10 pleadings liberally and afford the plaintiff any benefit of the doubt. Karim-Panahi v. Los Angeles
 11 Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is “particularly
 12 important in civil rights cases.” Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving
 13 liberal interpretation to a *pro se* civil rights complaint, however, the court may not “supply essential
 14 elements of the claim that were not initially pled.” Ivey v. Bd. of Regents of the Univ. of Alaska,
 15 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in
 16 civil rights violations are not sufficient to withstand a motion to dismiss.” Id.

17 **1. Defendant Savala**

18 The report and recommendation addressed the one claim of due process that Defendant
 19 claims in his motion is the “only potential claim containing more than naked assertions.” (Dkt. No.
 20 5-1.) The Court recommended granting Defendant Savala’s motion to dismiss the due process claim
 21 with leave to amend. The report also recommended that Savala’s motion to dismiss the due process
 22 claim based on qualified immunity should be denied as premature. After having reviewed the report
 23 and recommendation and no objections having been filed, the Court ADOPTS the report and
 24 recommendation and GRANTS Defendant Savala’s motion to dismiss the due process claim with
 25 leave to amend.

26 However, the Magistrate Judge recommended denying the remaining allegations as to
 27 Defendant Savala because Defendant had not specifically moved and provided substantive
 28 arguments to dismiss Plaintiff’s remaining allegations of constitutional violations. Defendant filed

1 objections that the magistrate judge did not recommend dismissal of all claims against him with
 2 leave to amend to make factual allegations to support every claim. Defendants also provided the
 3 theories of liability and substantive argument as to each “everything-but-the-kitchen sink” claims.

4 Defendant Savala was the hearing officer for Plaintiff’s disciplinary violation involving a
 5 request by Defendant Lankford to terminate Plaintiff from his prison job due to alleged carelessness
 6 and recklessness as a forklift operator. (Compl. at 11-15.) Plaintiff alleges that Savala postponed
 7 the rules violation hearing, failed to stop the hearing in order for Plaintiff to find additional
 8 witnesses when his witness gave an answer not supportive of Plaintiff, failed to dismiss the
 9 disciplinary action after hearing the first witness testify, failed to dismiss the disciplinary action after
 10 hearing the second witness testify, and again failed to dismiss the hearing after all witnesses
 11 testified. (*Id.*) Savala also allegedly prevented Plaintiff from interviewing witnesses in person and
 12 failed to allow witnesses to testify in person. (*Id.*) In essence, as Defendant argues in his motion to
 13 dismiss, he has alleged facts supporting a potential claim of due process.

14 Plaintiff has also alleged nine² additional claims of conspiracy, racial discrimination,
 15 discrimination, freedom of association, free speech, freedom from cruel and unusual punishment,
 16 deprivation of rights, equal protection and federal civil procedure against Defendant Savala.
 17 Plaintiff asserts these constitutional violations without providing any specific and supporting facts.
 18 Plaintiff fails to even state the elements of each cause of action. Plaintiff only provides a conclusory
 19 allegation of a constitutional violation without any factual support. Therefore, it was appropriate for
 20 Defendant to argue that the remaining claims failed to provide a “short and plain statement of the
 21 claim.” Accordingly, the Court SUSTAINS Defendant’s objections and GRANTS Defendant
 22 Savala’s motion to dismiss the remaining claims of conspiracy, racial discrimination, discrimination,
 23 freedom of association, free speech, freedom from cruel and unusual punishment, deprivation of
 24 rights, equal protection, and federal civil procedure for failure to state a claim.

25 **2. Defendant Garcia**

26 The report recommended that the procedural due process and equal protection claims that

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 28 ²As discussed above, the Court adopted the report and recommendation and granted Defendant’s
 motion to dismiss the due process and state negligence claims. Therefore, out of the eleven claims, nine
 remain.

Defendant addresses in his motion to dismiss should be granted with leave to amend and also recommended that the substantive due process allegation should be dismissed with prejudice. It also recommended that Defendant's motion to dismiss based on qualified immunity should be denied as premature on the procedural due process and equal protection claims but granted for any substantive due process contention. After having reviewed the report and recommendation and no objections having been filed, the Court ADOPTS the report and recommendation and GRANTS Defendant Garcia's motion to dismiss the due process and equal protection claims with leave to amend and GRANTS Defendants Garcia's motion to dismiss the substantive due process claims and DISMISSES that claim with prejudice. The Court also DENIES Defendant Garcia's motion to dismiss based on qualified immunity as premature but GRANTS Defendant's motion to dismiss the substantive due process based on qualified immunity.

However, the magistrate judge recommended denying the remaining allegations as to Defendant Garcia because Defendants have not specifically moved and provided substantive argument to dismiss Plaintiff's remaining allegations of constitutional violations.³ Defendant filed objections that the Magistrate Judge did not recommend dismissal of all claims against him with leave to amend to make factual allegations to support every claim.

As Chief Deputy Warden, Garcia was the supervisor of Defendants Gomes, Ramos, Savala and Lankford. Plaintiff alleges that Defendant Garcia knew or should have known that Plaintiff had been terminated from his job and issued a C.D.C. 115 disciplinary action report. (Compl. at 56.) Plaintiff claims she knew or should have known that his C.D.C. 115 was reduced to a "C.D.C. 128 chrono" and Plaintiff was to be reinstated to his job as a Leadman and that he was prevented from returning to work by Defendants Lankford and Ramos. (*Id.* at 56-57.) Defendant also knew or should have known that Plaintiff had taken another job, out of duress, in order to accumulate work

³Defendants argue that the Magistrate Judge did not address Defendants' request to dismiss the "everything-but-the-kitchen-sink" claims against Garcia; however, they object that the Magistrate Judge did not recommend dismissal of all claims against Defendants Savala and Garcia. In the Conclusion section of the report and recommendation, the Magistrate Judge stated, "[a]s discussed previously, the Defendants have not specifically moved to dismiss Clay's remaining constitutional violation allegations and have not provided the Court with substantive arguments outlining the basis for their dismissal." (Dkt. No. 7 at 39.) It can be inferred that the Court recommended denying Defendants Savala and Garcia's remaining "everything-but-the-kitchen-sink" claims.

1 experience. (Id. at 57.) She should have also known that Defendant Lankford submitted a claim that
2 working in the same warehouse with Plaintiff made her feel unsafe. (Id.) He also alleges that
3 Garcia, “being the senior authority figure” should have given Plaintiff a face to face interview and
4 ordered an investigation because she knew that when an inmate is accused of making a staff member
5 feel unsafe, the inmate is automatically removed from his job position. (Id. at 57-60.) Garcia
6 allegedly knew or should have known that Plaintiff was not a threat to anyone because he had not
7 been removed from the general population and placed in administrative segregation. (Id. at 60-61.)

8 Defendant Garcia also answered his inmate grievance at the second level. (Id. at 61.) If
9 Defendant Garcia had done a thorough and proper investigation, she would have realized that her
10 subordinates Hawthorne, Gomes, Ramos and Lankford were in violation of the Work Incentives
11 Program regarding ethnic balance. (Id. at 62.) Plaintiff alleges constitutional violations against
12 Defendant Garcia in her role as a superior to the other Defendants. (Id. at 62-66.)

13 Plaintiff has also alleged eight additional claims of free speech, freedom of association, state
14 and federal civil procedure, negligence, discrimination, racial discrimination, conspiracy, and cruel
15 and unusual punishment and deprivation of rights against Defendant Garcia.

16 Most of Plaintiff’s allegations concern Garcia’s role as supervisor to the other Defendants.
17 To state a claim against a state official under section 1983, the complainant must allege direct
18 personal participation by the defendant. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). There
19 is no respondeat superior liability under 42 U.S.C. § 1983. Palmer v. Sanderson, 9 F.3d 1433, 1437-
20 38 (9th Cir. 1993). “A supervisor is only liable for the constitutional violations of his subordinates if
21 the supervisor participated in or directed the violations, or knew of the violations and failed to act to
22 prevent them.” Id. If there is no affirmative link between a defendant’s conduct and the alleged
23 injury, there is no deprivation of the plaintiff’s constitutional rights. Rizzo v. Goode, 423 U.S. 362,
24 370 (1976).

25 “Causation is, of course, a required element of a § 1983 claim.” Estate of Brooks v. United
26 States, 197 F.3d 1245, 1248 (9th Cir. 1999). “The inquiry into causation must be individualized and
27 focus on the duties and responsibilities of each individual defendant whose acts or omissions are
28 alleged to have caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th Cir.

1 1988) (citing Rizzo, 423 U.S. at 370-71).

2 “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that
3 each Government-official defendant, through the official’s own individual actions, has violated the
4 constitution.” Iqbal, 129 S.Ct. at 1948. Further, a supervisor’s mere knowledge of his subordinates’
5 discriminatory purpose does not amount to the supervisor violating the Constitution. Id. at 1949.

6 Here, Plaintiff repeatedly alleges that because of Garcia’s role as supervisor, she is
7 responsible for the violations associated with his disciplinary hearing. He does not provide any
8 specific facts that Garcia participated in or directed any of the alleged violations. As to the
9 allegation that Defendant denied his administrative grievance, such a claim cannot state a cause of
10 action under section 1983. See Ramirez v. Galaza, 334 F.3d 850, 960 (9th Cir. 2003) (inmates do
11 not have a “constitutional entitlement to a specific prison grievance procedure.” Furthermore,
12 Plaintiff alleges constitutional violations without any factual support. Plaintiff again fails to state
13 facts or facts to support the elements of each cause of action. Therefore, it was appropriate for
14 Defendant to argue that the remaining claims failed to provide a “short and plain statement of the
15 claim.”

16 Accordingly, the Court SUSTAINS Defendant’s objections and GRANTS Defendant
17 Garcia’s motion to dismiss the remaining claims of conspiracy, racial discrimination, discrimination,
18 freedom of association, free speech, freedom from cruel and unusual punishment, deprivation of
19 rights, and federal civil procedure for failure to state a claim.

20 **Conclusion**

21 Based on the above, the Court SUSTAINS Defendant’s objections to the report and
22 recommendation. The Court ADOPTS in part and DECLINES to ADOPT in part the Magistrate
23 Judge’s report and recommendation. Accordingly, IT IS HEREBY ORDERED that:

- 24 1. The Court *sua sponte* DISMISSES Defendant Hawthorne for Plaintiff’s failure to
25 timely serve Hawthorne pursuant to Federal Rule of Civil Procedure 4(m).
- 26 2. The Court GRANTS Defendants’ motion to dismiss the state negligence cause of
27 against all Defendants with leave to amend. Consequently, the Court DENIES
28 Defendants Savala and Garcia’s request to dismiss the state negligence on

1 discretionary immunity grounds as premature.

2 3. The Court GRANTS Defendants Lankford, Ramos, and Gomes' motion to dismiss
3 the claims against them for failing to comply with the statute of limitations for any
4 conduct prior to April 10, 2007. The Court GRANTS Plaintiff leave to file an
5 amended complaint to allege claims that accrued after April 10, 2007.

6 4. The Court GRANTS Defendant Savala's motion to dismiss the procedural due
7 process claim against him with leave to amend. The Court DENIES Defendant's
8 motion to dismiss the procedural due process claim based on qualified immunity as
9 premature. The Court also GRANTS Defendant Savala's motion to dismiss the
10 claims of conspiracy, racial discrimination, discrimination, freedom of association,
11 free speech, freedom from cruel and unusual punishment, deprivation of rights, equal
12 protection, and federal civil procedure.

13 5. The Court GRANTS Defendant Garcia's motion to dismiss the procedural due
14 process and equal protection claims with leave to amend. The Court GRANTS
15 Defendant Garcia's motion to dismiss the substantive due process allegations and
16 DISMISSES the claim with prejudice. The Court DENIES Defendant's motion to
17 dismiss the procedural due process and equal protection claims based on qualified
18 immunity as premature but GRANTS Defendant's motion to dismiss the substantive
19 due process based on qualified immunity. The Court also GRANTS Defendant
20 Garcia's motion to dismiss the claims of conspiracy, racial discrimination,
21 discrimination, freedom of association, free speech, freedom from cruel and unusual
22 punishment, deprivation of rights, and federal civil procedure.

23 Plaintiff shall file a first amended complaint no later then 45 days after the date of the filing

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2 of this order. Plaintiff should note that all claims alleged in the First Amended Complaint which are
3 not asserted in the Second Amended Complaint will be considered waived. King v. Atiyah, 814
4 F.2d 565, 567 (9th Cir. 1987).

5 IT IS SO ORDERED.

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7 DATED: March 20, 2012

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Hon. Anthony J. Battaglia
U.S. District Judge

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